IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976
No. _____ 76-1469

GREGORY FRANK SPEROW
and TOMMY FINE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
DIRECTED TO THE UNITED STATES
COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Your petitioners respectfully petition for a writ of certiorari directed to the United States Court of Appeals for the Tenth Circuit, to review and reverse an order and judgment, on the ground that their detention and arrest was illegal and that the search and seizure of their automobile and the seizure of marijuana therein was in violation of the Fourth Amendment to the Constitution of the United States.

JURISDICTION

Jurisdiction is conferred by 28 U.S.C. §1254(1), and by Rule 19(b), Rules of this Court. This petition is being filed within the time allowed by law.

OPINION BELOW

The decision of the United States Court of Appeals for the Tenth Circuit, affirming the judgment of the United States District Court for the District of New Mexico, was filed and its judgment was thereby entered on March 23, 1977. Said decision of the Court of Appeals is attached hereto, marked Appendix "A" and made a part hereof.

CONSTITUTIONAL PROVISION INVOLVED

Involed herein is the Fourth Amendment to the Constitution of the United States as construed in United States v. Brignoni-Ponce, 422 U.S. 873.

STATEMENT OF THE CASE

Defendants Gregory Frank Sperow and Tommy Fine were indicted on August 21, 1975,

in the United States District Court for the District of New Mexico, Number 75-274 Criminal. Defendants were charged with Possession of Marijuana, for violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2; and Importation of Marijuana, for violation of 21 U.S.C. 952(a), 21 U.S.C. 960(a)(1), and 18 U.S.C. 2. Timely Pre-trial Suppression Motions were raised on behalf of both Defendants, said Motions being denied by the District Court. The cause was tried to the Court, sitting without a jury, on October 14, 1975. On December 11, 1975, the District Court entered Findings of Fact and Conclusions of Law, finding both Defendants guilty on both Counts of the Indictment.

Defendants appealed the convictions to the United States Court of Appeals for the Tenth Circuit. The Court of Appeals affirmed the judgment of the District Court on March 23, 1977.

The following facts are pertinent in regard to the issue presented in this petition.

On August 20, 1975, at 1:25 a.m., sensor 212, located on New Mexico Highway 9, was tripped, indicating the presence of a motor vehicle [R. 18]. Sensor 212 is located approximately ten (10) miles west of Columbus, New Mexico [R. 24]. Subsequently, sensor 211 was activated, indicating that the subject vehicle was traveling in a westerly direction on Highway 9 [R. 18, 24-25]. Later, the vehicle turned north on New Mexico Highway 81 and U.S. Interstate Highway 10 [R. 12, 18].

The tripping of sensor 212 was monitored in El Paso, Texas [R. 22], and this information was radioed to Border Patrol agents in the area [R. 44]. Subsequently, Agents Hayes and Williams parked their patrol car on Highway 81 and waited for a vehicle to pass [R. 12]. Defendants' vehicle passed them at approximately 2:00 a.m., whereupon it was stopped by the Agents [R. 5, 6]. The point of the stop is located approximately eighteen (18) air miles from the international border between the United States and Mexico [R. 5]. Upon subsequent search, Defendants' vehicle was found to contain a quantity of marijuana [R. 64, 65, 67]. It was later discovered that Defendants' vehicle had, in fact, crossed the international border approximately ten (10) miles west of Columbus, New Mexico. Crossing was effectuated by laying down a fence with the vehicle being driven over it [R. 16-17].

At the time Defendants' vehicle was stopped, Agents Hayes and Williams knew the following facts: A vehicle (of unknown description) had tripped sensor 212 at 1:25 a.m., and had apparently continued driving west toward Hachita, New Mexico. There had been, at least since midnight, no other traffic to the east or north of sensor 212 [R. 12-13]. Although there are several farm roads in the area, in the Agent's experience, the local farmers and ranchers do not generally drive their vehicles at two o'clock in the morning [R. 10]. At the time Defendants' vehicle was stopped on highway 81 north of Hachita, the Agents observed what appeared to be a heavily loaded camper with out-of-state

license plates [R. 8, 10]. The Agents did not recognize this vehicle as belonging to any of the local inhabitants, and from a visual check were unable to determine the nationality of the driver and passenger [R. 9]. In order to so determine the nationality of the occupants of Defendants' vehicle, Agents Hayes and Williams then stopped the vehicle [R. 9-10].

What the Government did not prove, and could not prove, is that at the time of the stop, there was any reason to believe Defendants were transporting contraband or illegal aliens, other than the Agents' experience and belief that smuggling had in the past occurred within the area [R. 7, 8]. There was no proof at the time of the stop that an illegal border crossing had been effectuated, as the Agents admitted that Defendants' vehicle could have been parked along the side of Highway 9 prior to midnight, August 20, 1975, and then driven on to trip sensor 212 later that morning [R. 18, 19, 34]. Moreover, the Government proved only that a vehicle proceeded west on Highway 9 toward Hachita, and that a vehicle later drove north from Hachita on Highway 81. The Government did not prove that the same vehicle was involved in both trips of the sensors, nor was it ever shown that there was any reason to believe that the vehicle traveling north on Highway 81 had not arrived in Hachita from the south or west, and then proceeded north. Nor was there any reason to believe that the vehicle which tripped sensor 212 had not stopped in Hacita, and that a different vehicle proceeded north on Highway 81 from Hachita to the eventual point of detention.

QUESTION PRESENTED

Whether the roving border patrol officers' observations and/or knowledge reasonably lead them to believe that defendants' vehicle might have contained aliens who illegally entered the country so as to permit them to stop the vehicle briefly to investigate the circumstances which provoked their suspicion.

ARGUMENT FOR GRANTING THE WRIT

I

The Fourth Amendment Dictates That Roving Border Patrol Officers Must Have a Reasonable Suspicion to Justify Roving Patrol Stops to Investigate For Entry of Illegal Aliens (United States v. Brignoni-Ponce, 422 U.S. 873).

Since the decision in United States v. Brignoni-Ponce, supra, it is now clear that a roving border patrol may not stop a vehicle in an area near the border and question its occupants without reasonable suspicion to suspect that a vehicle may contain aliens who are illegally in the country.

The stop in Brignoni-Ponce was disapproved and deemed illegal because the only suspicion

relied upon by the roving patrol therein was that the occupants of the suspect vehicle appeared to be of Mexican ancestry.

Brignoni-Ponce discussed various factors which might be considered when assessing what constitutes a reasonable suspicion for a roving patrol to stop a vehicle near the border:

> "Any number of factors may be taken into account in deciding whether there is reasonable suspicion to stop a car in the border area. Officers may consider the characteristics of the area in which they encounter a vehicle. Its proximity to the border, the usual patterns of traffic on the particular road, and previous experience with alien traffic are all relevant. See Carroll v. United States, 267 U.S. 132, 159-161, 69 L.Ed. 543, 45 S.Ct. 280, 39 ALR 790 (1925); United States v. Jaime-Barrios, 494 F.2d 455 (CA 9), cert. denied, 417 US 972, 41 L.Ed.2d 1143, 94 S.Ct. 3178 (1974).[10] They also may consider information about recent illegal border crossings in the area. The driver's behavior may be relevant, as erratic driving or obvious attempts to evade officers can support a reasonable suspicion. See United States v. Larios-Montes, 500 F.2d 941 (CA 9 1974); Duprez v. United States, 435 F.2d 1276 (CA 9 1970). Aspects of the vehicle itself may justify suspicion. For instance, officers say that certain

station wagons, with large compartments for fold-down seats or spare tires, are frequently used for transporting concealed aliens. See United States v. Bugarin-Casas, 484 F.2d 853 (CA 9 1973), cert. denied, 414 U.S. 1136, 38 L.Ed.2d 762, 94 S.Ct. 881 (1974); United States v. Wright, 476 F.2d 1027 (CA 5 1973). The vehicle may appear to be heavily loaded, it may have an extraordinary number of passengers, or the officers may observe persons trying to hide. See United States v. Lariosmontes, supra. The Government also points out that trained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut. Reply Brief ror United States 12-13, in United States v. Ortiz, post, p. 891, 45 L.Ed.2d 623, 95 S.Ct. 2585. In all situations the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling. Terry v. Ohio, 392 U.S. at 27, 22 L.Ed.2d 676, 89 S.Ct. 1394." Id at pp. 884-885.

Despite the above examples, footnote 10 of Brignoni-Ponce disclaims approval of them on their merits with the admonition that "[e]ach case must turn on the totality of the particular circumstances." This petition seeks to give greater meaning to Brignoni-Ponce by determining just what combination of circumstances will be deemed sufficient to constitute reasonable suspicion to stop and detain vehicles, traveling near the

border, for the questioning of occupants.

Footnote 10 of Brignoni-Ponce leaves open the question of whether the Court of Appeals of the Tenth Circuit has decided a Fourth Amendment question in a manner which is in conflict with this Court, as petitioners believe is the case.

Wherefore, petitioners pray that this Honorable Court grant a writ of certiorari for the reasons above stated and order the evidence found in petitioners' vehicle suppressed.

Respectfully submitted,

FRANKLIN D. LAVEN

Attorney for Petitioners

APPENDIX A

FILED
Mar 23 1977
Howard Phillips
Clerk, United States
Court of Appeals
Tenth Circuit

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 76-1167 and 76-1168

UNITED STATES OF AMERICA,	)
	) Appeal from
Plaintiff-Appellee,	) the United
v.	) States District
	) Court for the
GREGORY FRANK SPEROW	) District of
and TOMMY FINE,	) New Mexico
	) (D.C. No.
Defendants-Appellants.	) CR-75-274)
	)

Don J. Svet, Assistant United States Attorney, Albuquerque, New Mexico (Victor R. Ortega, United States Attorney, on the brief), for Plaintiff-Appellee.

Terrence A. Roden of Ronald J. Le Mieux & Associates, Los Angeles, California, for Defendant-Appellant Gregory Frank Sperow.

Vince D. Angelo (Robert T. Knott of Knott & Associates, Albuquerque, New Mexico, on the brief), for Defendant-Appellant Tommy Fine.

Before McWILLIAMS, BARRETT and DOYLE, Circuit Judge.

Defendants-appellants seek reversal of convictions for possession and importation of marijuana. This is an arrest and search which took place very near to the Republic of Mexico-New Mexico border, on August 20, 1975, at about 2:00 a.m. The validity of the border patrol's stopping and seatching the vehicle is challenged.

The agents testified to having received by radio sensor data identifying the appellants' truck as it was traveling in a westerly direction parallel to the border. The road on which the appellants were traveling at the time that Sensor No. 212 picked them up (Highway 9) was an east-west road, and the place where they were located was one and one-half miles from the Mexican border. The Sensors to the east of Sensor 212, however, had not been tripped. On the east-west highway on which they were first identified, they were traveling in a westerly direction. Suddenly they turned north on another road and were stopped while traveling in this direction at a point some 18 miles from the border.

When questioned, one of the defendants said that they had come from El Paso. This aroused suspicion because it was inconsistent with the data which the agents had. During the questioning, and upon one of the agents smelling marijuana in the vehicle, a search was conducted and a large quantity of marijuana was uncovered in the back of the truck.

It is the contention of defendants-appellants that the agents lacked the requisite knowledge to arouse a reasonable suspicion necessary to justify the stopping of the vehicle for a preliminary investigation. Defendants also contend that the search itself was thereby invalid.

The Supreme Court in a recent decision, United States v. Brignoni-Ponce, 422 U.S. 873 (1975), has given recognition to the proposition urged by the government, namely that it is permissible to stop automobiles at locations in close proximity to, but removed from the border itself or valid checkpoints, for the purpose of questioning occupants about their citizenship and immigration status. In so recognizing the right to make such preliminary investigations, Brignoni-Ponce differs from United States v. Almeida-Sanchez, 413 U.S. 266 (1973), wherein the right to stop and search by a roving patrol, acting with neither a warrant nor probable cause at points removed from the border, was condemned. About the only factor which justified the preliminary stopping and questioning in Brignoni-Ponce was that the occupants appeared to be of Mexican ancestry. The Supreme Court held that this was an insufficient predicate for this kind of investigative activity. The real significance of Brignoni-Ponce, however, was its recognition of the legality of

officers briefly stopping automobiles based on the ground that they suspected that they were illegal aliens. The Court noted that it was a limited intrusion which in proper circumstances could give way to the public interest served by the preliminary investigation.

The analogy which is used by the Court is Terry, 392 U.S. 1 (1968), in which limited search of a person for weapons was approved based upon reasonable suspicion that the individual searched had a concealed weapon. The Court also relied on Adams v. Williams, 407 U.S. 143 (1972), which held that a policeman acted legally in approaching a suspect for the purpose of investigating whether he was carrying narcotics and a gun, a tip having been furnished to the officer.

The Supreme Court in Brignoni-Ponce emphasized that articulable factors must be present in order to justify an investigative stopping of a vehicle by a roving patrol. The factors to be taken into account in deciding whether there is reasonable suspicion justifying the stopping of a car in the border area are stated in the following passage:

> Any number of factors may be taken into account in deciding whether there is reasonable suspicion to stop a car in the border area. Officers may consider the characteristics of the area in which they encounter a vehicle. Its proximity to the border, the usual patterns of traffic on the particular road, and previous experience with alien traffic are all relevant. * * * They also may consider

information about recent illegal border crossings in the area. The driver's behavior may be relevant, as erratic driving or obvious attempts to evade officers can support a reasonable suspicion. * * * Aspects of the vehicle itself may justify suspicion. For instance, officers say that certain station wagons, with large compartments for fold-down seats or spare tires, are frequently used for transporting concealed aliens. * * * The vehicle may appear to be heavily loaded, it may have an extraordinary number of passengers, or the officers may observe persons trying to hide. * * * The Government also points out that trained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut.

422 U.S. at 884-85.

The Court added that "the officer is entitled to assess the facts in light of his experience detecting illegal entry and smuggling." Id.

The single factor considered by the officers in Brignoni-Ponce was the Mexican ancestry of the occupants. This the Court said was insufficient to furnish reasonable grounds that the three occupants were aliens. This factor alone was insufficient to produce a reasonable belief that the car concealed other aliens or that the three occupants were aliens. "[S]tanding alone it does not justify stopping all Mexican-Americans to ask

if they are aliens." 422 U.S. at 887.

In the case at bar there is present the factor that the vehicle employed was a truck with a camper on the back and it was heavily loaded, but more important than either of these factors is the fact that the vehicle came to be identified very near the border, a mile and one-half from it. Moreover, this was not a random checking of vehicles. The officers, after having recieved the radio message concerning the vehicle, were stopped along the road waiting for this particular vehicle to pass. The time of night was significant. The testimony showed that the ranchers in the area were not prone to drive the roads in question at 2:00 a.m. so that it was inferable that the vehicle had passed the border. In our view the factors that are mentioned in the Brignoni-Ponce case are satisfied and it was proper for the officers to stop the vehicle based on their reasonable suspicion that they were illegally smuggling or transporting persons from Mexico. Once the vehicle was stopped and the marijuana was sniffed and identified, there existed probable cause for the search. Probable cause exists if the facts and circumstances known to an officer justify a prudent man's believing that an offense has been committed. See Henry v. United States, 361 U.S. 98 (1959) and Carroll v. United States, 267 U.S. 132 (1925).

Our court has recognized that marijuana has a distinct smell and that this alone can satisfy the probable cause requirement in a search such as the present one. United States v. Bowman, 487 F.2d 1229, 1230 (10th Cir. 1973).

Being of the opinion that the stopping was valid and that there existed probable cause for the search, the judgment of the district court is affirmed.